

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM R. McCLOE,

Plaintiff-Appellee,

v

PATRICIA A. McCLOE,

Defendant-Appellant.

UNPUBLISHED

March 17, 2000

No. 212365

Jackson Circuit Court

LC No. 97-081113-DM

Before: Wilder, P.J., and Bandstra and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. The issues on appeal pertain to the division of property and the denial of defendant's request for attorney fees and costs. We affirm.

Defendant argues that the trial court erred when it failed to award her at least some portion of plaintiff's severance package, a compensation package that plaintiff became eligible for as a request of his employment. We disagree. In reviewing a dispositional ruling in a divorce case, the standard of review dictates that this Court must first review the trial court's findings of fact for clear error and then decide whether the dispositional ruling was fair and equitable in light of the facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Property disposition rulings will be affirmed unless this Court is left with the firm conviction that the distribution was inequitable. *Id.* at 429-430. When determining property rights in a divorce, the trial court may apportion all property that has "come to either party by reason of the marriage" *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997), quoting MCL 552.19; MSA 25.99. "Assets earned by a spouse during the marriage are properly considered part of the marital estate." *Byington, supra*. Marital property is generally divided between the parties, while each party takes away from the marriage that party's own separate estate with no invasion by the other party. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). Although there is no set formula for property division, the goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *Byington, supra* at 114.

Although the trial court awarded a portion of plaintiff's stay bonus to defendant, it elected not to award any portion of the severance package (if that compensation was ever in fact received by plaintiff). The record is unclear as to whether the court actually determined the severance package to be a separate asset belonging solely to plaintiff, or merely found that this was a marital asset of which no portion would be distributed to defendant. However, despite any *possible* erroneous finding of fact by the trial court, the dispositional ruling in this case was fair and just, and, therefore, will be upheld. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993)(a dispositional ruling will be affirmed unless the reviewing court is left with the firm conviction that the division was inequitable).

In the instant case, disposition of the majority of the property held by the parties was effectuated by a settlement agreement negotiated by the parties themselves. Under this agreement, the parties' marital home was awarded to defendant. At the time of trial, the parties held approximately \$17,500 equity in the home which plaintiff agreed to relinquish to defendant. Defendant also received one year of nonmodifiable spousal support at \$82 per week, one-half of plaintiff's 401k plan that had a value of approximately \$135,000, one-half of a \$4,158 savings account, and one-half of certain other retirement payments valued at the time of trial at approximately \$1900 per month. Defendant also was to receive relief from medical debt in the amount of \$940. In addition, under the settlement agreement, each party was to receive the personal property in his or her possession. Plaintiff was awarded his automobile and an Individual Retirement Account valued at \$21,600 that he owned before the parties were married.

At trial, the court found neither party solely responsible for the breakdown of the marriage. The court noted that plaintiff was already obligated to pay \$107 dollars in child support per week for a child from a previous marriage and that plaintiff had agreed to pay an additional \$214 per week for the two children resulting from his marriage with defendant. The court also considered the spousal support already agreed to by the parties. In light of these facts, the court ordered that plaintiff pay \$30 per week toward COBRA coverage for defendant in the second and third years after the divorce became final. The court further awarded defendant relief from her half of the credit card debt owed by the parties, to be paid from plaintiff's annual performance based APAR bonus. Defendant was also awarded one-half of plaintiff's stay bonus should he receive it.

With regard to the severance package, the court prefaced its decision not to divide the severance package by stating that "the idea of severance pay . . . is . . . compensation for having lost [one's] job." Moreover, in so ruling and presumably in response to defendant's concern that plaintiff may elect to take the severance pay solely in an effort to deprive her of receipt of any benefits, the court warned plaintiff that it would not modify the COBRA or child support obligations should plaintiff receive that severance package and take employment at a considerable salary decrease. The court further noted its belief, based upon the favorable aspects of plaintiff's current employment, that if offered employment by the new entity, plaintiff would elect to stay rather than take the severance bonus and risk finding comparable employment elsewhere. In light of the foregoing facts, the disposition ordered by the trial court is equitable and will not be disturbed.

Defendant next claims that the trial court abused its discretion in denying her request for attorney fees. We disagree. Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit, and this Court will not reverse the trial court's decision absent an abuse of

discretion. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). However, a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Id.* The party requesting such fees must “allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay.” MCR 3.206(C)(2).

At trial, defendant testified to incurring more than \$8,000 in attorney fees. Defendant argues that because she currently has no earned income and will have to live off the funds provided by the parties’ settlement agreement, plaintiff should be required to pay half the attorney fees incurred by her in the divorce. Defendant additionally notes her intention to utilize the settlement funds to further her education so that she can more readily provide for her family in the future, and states that she will be unable to both work and go to school while taking care of her children, who were three and eight years old at the time of trial. At trial, defendant testified that plaintiff receives significant benefits from his job, such as clothing and a car allowance, as well as a company expense account, and thus is more able to weather the expense of her attorney fees. Plaintiff does not dispute that it might be difficult for defendant to bear the costs associated with the divorce; however, plaintiff argues that he is in no greater financial position to pay those costs. At trial, plaintiff claimed that although he is employed, child support and other mandatory deductions from his salary decrease his disposable income to approximately \$9,500 per year.

In ordering that both parties bear responsibility for their own fees, the trial court noted that, following the property disposition, neither party was in possession of any substantial liquid assets. In addition, the court noted that the household budget plan described by defendant at trial, including her desire to live off the settlement agreement and not work while furthering her education, may not have been reasonable. Under these circumstances, it was not an abuse of discretion to order that each bear the costs of their own attorney fees.

We affirm.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh